

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARY PAULINE RIVERA, } Civil No. 11CV38 JAH(JMA)
Plaintiff, }
v. }
MARTEN TRANSPORT and }
HIRERIGHT, }
Defendant. }
}
}
}
}
}
}

**ORDER SUA SPONTE
DISMISSING COMPLAINT
WITHOUT PREJUDICE; AND
DENYING PLAINTIFF'S MOTION
FOR APPOINTMENT OF
COUNSEL AND MOTION TO
PROCEED *IN FORMA PAUPERIS*
AS MOOT**

Plaintiff, a non-prisoner appearing *pro se*, filed the instant complaint, along with a motion to proceed *in forma pauperis* and a motion for appointment of counsel. All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee only if the plaintiff is granted leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).

Notwithstanding payment of any filing fee or portion thereof, a complaint filed by any person seeking to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915(a) is subject to a mandatory and *sua sponte* review and dismissal by the court to the extent it is "frivolous, malicious, failing to state a claim upon which relief may be granted, or seeking monetary relief from a defendant immune from such relief." 28 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) ("[T]he provisions of 28 U.S.C.

1 § 1915(e)(2)(B) are not limited to prisoners."); Lopez v. Smith, 203 F.3d 1122, 1126-27
 2 (9th Cir. 2000) (en banc). 28 U.S.C. § 1915(e)(2) mandates that the Court reviewing a
 3 complaint filed pursuant to the *in forma pauperis* provisions of Section 1915 make and rule
 4 on its own motion to dismiss before directing that the complaint be served by the U.S.
 5 Marshal pursuant to Fed. R. Civ. P. 4(c)(2). Lopez, 203 F.3d at 1127.

6 This Court finds the instant complaint fails to state a basis for federal court subject
 7 matter jurisdiction, subjecting the complaint to *sua sponte* dismissal pursuant to
 8 Rule 12(h)(3) of the Federal Rules of Civil Procedure. See California Diversified
 9 Promotions, Inc. v. Musick, 505 F.2d 278, 280 (9th Cir. 1974)(it is well settled that a
 10 court can dismiss a complaint *sua sponte* for lack of jurisdiction). Plaintiff, a truck driver,
 11 alleges that her employer asked her to make a delivery that would cause her to run afoul
 12 of legal restrictions that limit the number of hours a truck driver can continuously drive
 13 their vehicle. Because plaintiff did not want to violate those legal restrictions, the delivery
 14 was late. Plaintiff contends the late delivery caused the truck company to issue a bad
 15 report against plaintiff that will remain on her record until 2016. According to the
 16 Complaint, this blemish on plaintiff's record prevents her from obtaining a driving
 17 position at another trucking company.

18 However, plaintiff does not indicate how these facts invoke federal jurisdiction.
 19 Although plaintiff checked the "federal question" box on her civil cover sheet to invoke
 20 federal question jurisdiction, the complaint must allege that the "action[] aris[es] under
 21 the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Plaintiff's
 22 complaint does not so allege. Thus, absent an averment, federal question jurisdiction is
 23 lacking and the complaint must be dismissed pursuant to Rule 12(h)(3).¹

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 28 ¹Plaintiff has also failed to allege the citizenship of herself and the defendant, or an amount in
 controversy. See 28 U.S.C. § 1332.

CONCLUSION AND ORDER

Based on the foregoing, IT IS HEREBY ORDERED that:

1. The instant complaint is *sua sponte* **DISMISSED** for lack of subject matter jurisdiction pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure;
 2. Plaintiff's motion to proceed *in forma pauperis* is **DENIED as moot**; and
 3. Plaintiff's motion for appointment of counsel is **DENIED as moot**.

Dated: February 10, 2011

JOHN A. HOUSTON
United States District Judge